

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**LARRY S. BANKHEAD**

**Plaintiff,**

**vs.**

**CASE NO. 2:04CV59**

**JO ANNE B. BARNHART,  
Commissioner of Social Security  
Administration,**

**Defendant.**

**OPINION/REPORT AND RECOMMENDATION  
*and* ORDER**

On the 17<sup>th</sup> day of August, 2004, Plaintiff filed his Complaint [Docket Entry 1]. On the 22<sup>nd</sup> day of October, 2004, Defendant filed an Answer to Plaintiff's Complaint [Docket Entry 5]. On the 22<sup>nd</sup> day of November, 2004, Plaintiff filed a Motion to Extend Time in which to file his motion for summary judgment [Docket Entry 6]. The Honorable Robert E. Maxwell, District Judge, entered an Order on November 22, 2004, denying, as moot, Plaintiff's Motion to Extend Time and ruling that motions for summary judgment in this case would be filed on or before January 24, 2005 [Docket Entry 7]. On the 24<sup>th</sup> day of January, 2005, Defendant filed a Motion for Summary Judgment [Docket Entry 8].

On the 9<sup>th</sup> day of March, 2005, District Judge Robert E. Maxwell, entered an Order dismissing Plaintiff's case for failure to prosecute and for failure to comply with the Court's November 22, 2004, Order, in that Plaintiff did not file his motion for summary judgment on or before January 24, 2005 [Docket Entry 9]. On the 22<sup>nd</sup> day of March, 2005, Plaintiff filed a Motion to Vacate Opinion Memorandum and Judgment Order Entered March 9, 2005, and for Reconsideration of Plaintiff's Motion for Judgment on the Pleadings, which were attached thereto [Docket Entry 13]. On the 24<sup>th</sup> day of March, 2005, Plaintiff filed an Amended Motion to Vacate Opinion Memorandum and Judgment Order Entered March 8, [sic] 2005, and for Reconsideration of Plaintiff's Motion for Judgment on the Pleadings [Docket Entry 15]. On the 28<sup>th</sup> day of April, 2005, an order was entered by The Honorable Robert E. Maxwell referring said motions to the undersigned Magistrate Judge (Docket Entry 17).

On the 10<sup>th</sup> day of May, 2005, the undersigned conducted a hearing on Plaintiff's Motion to Vacate Opinion Memorandum and Judgment Order Entered March 9, 2005, and for Reconsideration of Plaintiff's Motion for Judgment on the Pleadings and Amended Motion to Vacate Opinion Memorandum and Judgment Order Entered March 8, [sic] 2005, and for Reconsideration of Plaintiff's Motion for Judgment on the Pleadings [Docket Entries 13 and 15]. For reasons apparent to the Court and stated on the record of the May 10, 2005, hearing, the undersigned **RECOMMENDS** the Court vacate the Order of March 9, 2005, dismissing this case and that this case be reinstated on the Court's docket. The undersigned also finds this case has been fully briefed by the parties and, therefore, no further submissions shall be filed.

Any party may, within ten (10) days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made and the basis for such objection. A copy of such objections should also be submitted to the Honorable Robert E. Maxwell, United States District Judge. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation. 28 U.S.C. § 636(b)(1); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *Thomas v. Arn*, 474 U.S. 140 (1985).

The Clerk of the United States Court for the Northern District of West Virginia is directed to provide a true copy of this order to all counsel of record.

DATED: September 30, 2005

  
JOHN S. KAULL  
UNITED STATES MAGISTRATE JUDGE